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In The

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Fenal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BOOKS CITED—Continued

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The Politics of Protest, Violent Aspects of Protest and Confrontation, Vol. 3 (1969) (Staff Report to the National Commission on the Causes and Prevention of Violence) 33

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967) 32, 37

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ARTICLES CITED

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) 20, 23, 26, 36

Balch, The Police Personality: Fact or Fiction, 63 J. Crim. L. C. & P. S. 106 (1972) 34

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Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A. B. A. Jour. 479 (1922) 16

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BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Conference of Black Lawyers appears as Amicus Curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. The Conference is a national, not-for-profit, non-partisan, non-political membership organization incorporated under the laws of the District of Columbia. Its membership consists of over 1,000 of the nation's 5,000 Black lawyers, judges, and law professors. Also included in its membership are over 2,500 Black law students through the Black American Law Students Association (BALSA). As stated in its Articles of Incorporation, the purposes of NCBL are:

1. To work for the elimination of racism in the law.
2. To give attention to the root problems of the Black Community.
3. To analyze and study problems of Black attorneys in the United States in their legal practices.
4. To encourage Black youth to study law.
5. To cultivate the science of Jurisprudence to facilitate the administration of justice; to elevate the standards of integrity, honor and courtesy in the legal profession; and to cherish the spirit of brotherhood among the members thereof.

In futherance of these objectives, NCBL seeks to represent in our courts, nationwide, through affirmative litigation and criminal defense, the concerns of Black citizens who are the victims of racism and whose constitutionally guaranteed rights are being abrogated.

The Conference appears here because of its conviction that the instant case presents questions the resolution of which will have significant impact on the increasingly deteriorating relationship between the police and the Black communities in our nation's urban areas. The National Advisory Commission on Civil Disorders (The Kerner Commission Report), noted that Black citizens firmly believe that police brutality and harassment occur more frequently in Black neighborhoods as compared to their white counterparts. There is an abundance of literature that substantiates this belief as we discuss infra. If these attitudes are allowed to persist through continued patterns and practices of police misconduct, they invariably will contribute directly to suspicion and disrespect of law enforcement agencies. We believe that a major

objective of the exclusionary rule, though by no means the only objective, as our brief attests, is to deter police conduct in violation of the Fourth Amendment. Thus, the Conference believes that it has a direct interest in the outcome of this case.

———o———

ARGUMENT

I.

The Fourth Amendment Exclusionary Imperative applies with special force to the night search of a home on a warrant with a manifestly defective affidavit and evidence thereby seized could not be constitutionally used to convict respondent.

Chief District Judge Warren K. Urbom, and subsequently the Court of Appeals, properly ruled that the affidavit upon which the search warrant authorizing entry into respondent David L. Rice's home was predicated did "not meet either criterion of the *Aguilar-Spinelli* test". Indeed, the state trial court found that the affidavit, if not rehabilitated by evidence not disclosed to the magistrate, failed . . . "to establish probable cause justifying the search." *Rice v. Wolff*, 513 F. 2d 1280, 1290 n. 4 (1975). Since the premises were respondent's home and the search was during the night, the constitutional requirements apply with special force for "[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which

chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States,* 333 U. S. 10, 14 (1948). *See* also *Agnello v. United States,* 269 U. S. 20, 32 (1925); *Cady v. Dombrowski,* 413 U. S. 433, 441-442 (1973). *Cf.* Federal Rule of Criminal Procedure 41 (c).

So clearly correct are the rulings below that petitioner tacitly concedes that the District Judge and the Court of Appeals faithfully heeded this Court's teachings on the constitutional demand that inferences which justify the invasion of a dwelling "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States,* 333 U. S. 10, 13-14 (1948), and that the warrant could not be sustained "without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry." *Spinelli v. United States,* 393 U. S. 410, 419 (1969). (We repeat. Petitioner's Brief is but an extended concession of the patent inadequacy of the warrant. *See* especially Petitioner's Brief, pp. 18 and 19.) Instead, petitioner and amici either misreading or else over-reading this Court's refusal to extend the reach of the exclusionary rule in *Calandra v. United States,* 414 U. S. 338 (1974), and *Michigan v. Tucker,* 417 U. S. 433 (1974), audaciously urges this Court to abdicate its duty to protect Americans against all governmental invasions

> "of the sanctity of a . . . home and the privacies of life and the invasion of [the] indefeasible right of personal security, personal liberty and private property," *Boyd v. United States,* 116 U. S. 616, 630 (1886).

Petitioner would have this Court reject an earnestly developed constitutional jurisprudence, supported by Courts of Appeal and State Supreme Courts as well as scholars (see Argument I (A) and I (B) *infra*), which forbids lawlessness in the conviction of lawbreakers and scorns the government's "failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio,* 367 U. S. 643, 659 (1961). "[I]n the fourth amendment arena, the means by which the Court performs its duty appears to be through satisfying its responsibility under the judicial review/integrity rationale comprehensively to protect ('uphold') a defendant's fourth amendment rights." Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U. C. L. A. L. Rev. 1129, 1155-56 (1973). *See* James Madison's address to the First Congress, June 8, 1789, 1 Annals of Cong. 439 (1834), cited in *United States v. Calandra,* 414 U. S. 338, 356-57 (1974) (Brennan, J., dissenting.), and Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 756 (1970), which points out that "the exclusionary rule provides an occasion for judicial review. . . ." As this Brief shall demonstrate, such an abrupt departure from Fourth Amendment orthodoxy is not supported by the recent decisions of this Court, the decisions of the United States Courts of Appeal and State Supreme Courts, and recent scholarly consideration of this Court's work, even by those concerned, in John Kaplan's phrase, with the "political and enforcement costs of the exclusionary rule." Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford L. Rev. 1027, 1045 (1974).

Surely *United States v. Calandra, supra,* does not warrant the alternatively bold and alarmist assertions that, "[t]he time to end the experiment in our history when heinous criminals go free because of the operation of the exclusionary rule has come . . .; that the exclusionary rule is not working and should be modified," Petitioner's Brief, 35; or that "the present majority on [this] Court is willing to abdicate much of its role in enforcing the restraints of the Constitution in the hope that this will aid in the fight against crime." Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra,* 69 Nw. U. L. Rev. 740, 797 (1974). (Hereinafter cited as "Spiotto Critique.")

Though some students of the opinion and the dissent suggest that "the commitment of the present majority to judicial supervision of police practices is subject to legitimate doubt," *Spiotto Critique, supra,* at 797, the opinion itself stresses deterrence rather than the judicial integrity or personal rights necessity for exclusion. This no doubt is at least in part due to the ascendance of deterrence as a rationale for the rule and because it was, in the Court's view, more relevant to a resolution of the respondent's attempt to extend the exclusionary rule to grand jury proceedings. Thus it was that the Court weighed the value of deterrence against "the potential injury to the historic role and functions of the grand jury." *Calandra, supra,* 414 U. S. at 349. Instead of seeking undeterminable additional deterrence by permitting the exclusion of tainted evidence from Grand Jury consideration, the Court was concerned that the delay occasioned by suppression hearings might "be fatal to the enforcement of the criminal

law." 414 U. S. at 350. The majority of the Court believed that since in this context "the incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," ultimate exclusion of evidence at the trial itself would fulfill the deterrence aspects of the exclusionary doctrine. 414 U. S. at 351.

It is of course true that the dissent argued that the Court's single-minded emphasis on deterrence cast doubt on its fidelity to the doctrines of judicial integrity and personal rights which are "the very essence of constitutional liberty," *Gouled v. United States,* 255 U. S. 298, 304 (1921), and which are part of the rich cluster of values which informed the opinion of Mr. Justice Clark in *Mapp v. Ohio, supra.* However, the Court's *Calandra* opinion stresses deterrence as a practical concern rather than developing its relation to the fundamental considerations in which the Fourth Amendment is grounded. Clearly there is no disavowal of the more compelling reasons for the exclusionary rule affirmed by "John Adams' characterization of Otis' argument against search by the police that 'American independence was then and there born.'" *United States v. Rabinowitz,* 339 U. S. 56, 70 (1950) (Frankfurter, J., dissenting.)

But because *Calandra* has caused some commentators to believe that the Court is "preoccupied with judicial efficiency," Note, *The Fourth Amendment Exclusionary Rule in the Grand Jury Setting: United States v. Calandra,* 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 598, 622 (1974), the violation of respondent's constitutional right by the Omaha police is an appropriate opportunity for this Court

to once again affirm that the "exclusionary rule is an essential ingredient of the Fourth Amendment," *Mapp, supra,* 367 U. S. at 651, and to ground constitutional adjudication not on "fashionable" instrumental concerns but on values which are ends in themselves. *See* Fletcher, *Fairness and Utility in Tort Theory,* 85 Harv. L. Rev. 537, 538 n. 4 (1972).

A. Post-Calandra decisions have continued to apply traditional exclusionary doctrine and affirm the various theories upon which the Fourth Amendment right is premised.

Petitioner's plea for rejection or substantial modification of the exclusionary rule finds scant support in the decisions of the United States Courts of Appeal or State Supreme Courts. In applying the exclusionary rule, courts have, as required in particular cases, stressed the various theories to justify application of the Fourth Amendment imperative. Thus, as did this Court in *Calandra,* the Ninth Circuit Court of Appeal in *United States v. Barragan-Martinez,* 504 F. 2d 1155 (1974), emphasized the deterrent aspects of the Fourth Amendment exclusion right in suppresing testimony about on-the-scene identification of a defendant who had been unlawfully detained by immigration agents when the car in which he was riding was following a truck which was suspected of carrying smuggled aliens. The court also suppressed subsequent in-court identifications by the witness even though the government contended that the unlawful stop had produced no evidence used against the defendant. Judge Goodwin declared that, "Suppression here clearly serves the purpose of the exclusionary rule—to safeguard Fourth Amendment rights

by deterring future unlawful police conduct. (Citing cases.) By denying the government the use of identifications of *Barragan-Martinez* which flowed directly from the illegal stop of his car, the government presumably will be encouraged not to stop vehicles without at least a founded suspicion that the vehicle's occupants are or have been engaged in criminal conduct." 504 F. 2d at 1157-58. *See* also Chief Judge Coffin's opinion in *United States v. Belcufine,* 508 F. 2d 58 (1st Cir. 1974), which justifies exclusion as a deterrent to false or negligent misstatements in police affidavits supporting search warrants.

United States v. Acosta, 501 F. 2d 1330 (5th Cir. 1974), is a case like respondent's which involves the sufficiency of the information upon which a search warrant was issued. Judge Tuttle, speaking for himself and Judge Wisdom in a judgment subsequently affirmed by an equally divided court *en banc,* 509 F. 2d 539 (1974), answered a dissent by Judge Gee which, in the manner of Petitioner Charles L. Wolff, Jr., misinterpreted *Calandra, supra* and *Tucker, supra,* to mean that the right to exclusion depends upon its deterrent effect alone, by declaring:

> "... [D]ue to the extreme novelty of the view espoused by the dissent that the exclusionary rule is to be balanced against police misconduct on a case-by-case basis, we feel obliged to make a brief comment. Many have critized the utility of the exclusionary rule. These criticisms are familiar and need not be discussed more fully. There can be no doubt that *Weeks v. United States* . . . and *Mapp v. Ohio* . . . control this case. There is no suggestion in either of these two landmark decisions that the exclusionary rule can be ignored if in the opinion of the reviewing court the police conduct was neither wilful nor negligent. The exclusionary rule is a per se, prophylactic measure designed to pro-

> hibit the use of evidence seized in violation of the Fourth Amendment. There is no authority for the proposition that the exclusionary rule is to be balanced against the deterrent effect that exclusion might have on police misconduct in an individual case. The dissent cites no authority for its reliance upon this novel approach." 501 F. 2d at 1334 n. 2.

In *Acosta*, the magistrate himself supplied additional information about the informant's reliability but did not transcribe a recitation of his own information because "it involved my own knowledge and subjective state of mind." 501 F. 2d at 1332. The court held that affidavits which did not meet the requirements of *Aguilar-Spinelli* could not be saved because the issuing magistrate relied upon his own knowledge of the informant obtained in a previous case. Thus, despite the fact that officers applied for a warrant in a case involving "a rather high-level heroin dealer," and even though the magistrate satisfied himself "in a good faith which shines in the record that probable cause existed to believe [the officer and his informant]," (501 F. 2d at 1335, 1337), the Court of Appeals vindicated the defendant's Fourth Amendment right to exclusion.

Far less negligence and guess work and much more "good faith" were involved in *Acosta* than in the case at bar in which the affidavit is plainly and patently defective and there is no evidence at all that the issuing magistrate acted in any way other than as a rubber stamp. The reversal in *Acosta* thus underscores and affirms the right of the defendant to a warrant supported by an affidavit or its contemporaneous and transcribed supplement which meet the demands of *Aguilar-Spinelli* and which is subject to appellate review. So long as the *Acosta* magistrate's personal recollections went unrecorded, the defendant's

Fourth Amendment rights were at the unreviewable assessment of the issuing magistrate and the police with whom he was closeted alone in an *ex parte* proceeding.

As have Courts of Appeal, State High Courts have in recent opinions applied the exclusionary imperative and in doing so have made it clear that deterrence is but one rationale for doing so. In *Dyas v. Superior Court of Los Angeles County*, 11 C. 3d 628, 632, 522 P. 2d 674, 677 (1974), in suppressing a gun discovered concealed on the defendant by a Los Angeles Housing Authority patrolman, California Supreme Court Justice Mosk declared:

> "The two-fold purpose of the exclusionary rule is to deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the courts from being compelled to participate in such illegal conduct."

Although the uniformed housing authority patrolman was not a policeman, the Court applied the exclusionary rule because despite the claim that he acted as a private citizen, the evidence was seized in the performance of his duty as an officer and employee and agent of the State. What matters, the Court said is whether the patrolman was employed by an agency of government, federal, state or local, whose primary mission is to enforce the law.

Even more aggressive implementation of Fourth Amendment exclusionary protection by the California Supreme Court appears in *People v. Brisendine*, 13 C. 3d 528, 531 P. 2d 1099 (1975), where the court suppressed narcotics found in an opaque plastic bottle and in envelopes in a knapsack. The Court held that although a search of the knapsack itself was proper, a search of the bottle and envelopes found within the knapsack was improper because

they could not possibly have contained weapons nor could they have contained evidence of the crime for which the defendant was arrested—illegally starting a campfire. In reaching a result contrary to this Court's decisions in *United States v. Robinson*, 414 U. S. 218 (1973) and *Gustafson v. Florida*, 414 U. S. 260 (1973), Mr. Justice Mosk spoke of the California court's power to afford greater protections to Californians than required by this Court's construction of Fourth Amendment law. Because of the California's Court pathbreaking affirmation of the Fourth Amendment and its pre-*Mapp* espousal of State level exclusion in *People v. Cahan*, 44 C. 2d 416, 282 P. 2d 905 (1955), its vigorous application of the exclusionary imperative is not a surprise. (As the Appendix to *Elkins v. United States*, 364 U. S. 206, 224-232 (1960) makes clear, California was not alone in anticipating the requirement of *Mapp*.) *See* also a reaffirmation of *Brisendine* and another explicit rejection of *Robinson/Gustafson* in the California Supreme Court's August 6, 1975, opinion by Chief Justice Wright in *People v. Norman*, 14 C. 3d 929, 538 P. 2d 237 (1975).

Other State high courts have also applied the Fourth Amendment with vigor and have eschewed monotheoretical justifications for the protections afforded by the exclusionary imperative. Thus, in State of *Montana v. Coburn*, — Mt. —, 530 P. 2d 442 (1974), even though the narcotics sought to be suppressed were seized by the manager of a McDonald's hamburger restaurant and thus arguably were not the product of unlawful police behavior, the Court held that the judicial integrity doctrine of *Elkins, supra*, forbade use of the evidence in the prosecution. Given the fact that the police had prior knowledge and may have acquiesced in the removal of the narcotics from the work

jacket of the defendant, the Court declared that in "all of the court systems," judges should not "be accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Coburn, supra*, 530 P. 2d at 449, citing *Elkins, supra*, 364 U. S. at 223. Note also that *Coburn* stresses the protection of the right to privacy articulated in *Katz v. United States*, 389 U. S. 347 (1967), as an additional rationale for application of the exclusionary sanction.

In *State v. Timson*, 38 Ohio St. 2d 122, 311 N. E. 2d 16 (1974), the Ohio Supreme Court applied the exclusionary rule to suppress a gun found concealed on the defendant by a deputy sheriff, erroneously advised by another deputy sheriff that a federal warrant existed which justified defendant's arrest. In discussing the good faith of the deputy sheriff in words which strike at the heart of petitioner's contention that the enforcement of respondent's constitutional rights turns on the good faith (or lack thereof) of the Omaha police (*see* petitioner's Brief, pp. 35-38), the Court declared:

> "'This court is ever mindful of the difficult task of our police authorities, and in our decisions weigh every individual constitutional claim in the light of the voluminous responsibilities of our constabulary. However, the holding of this case merely reiterates the long-established law that an individual must ever be protected in his constitutional guarantees, and when a close question presents itself such must be answered in a manner to protect the individual, which individual, in a given instance, may be any one of us.'" 311 N. E. 2d at 21.

In another case involving unlawful possession of a gun, the New York Court of Appeals in *People v. Cantor*, 36 N. Y. 2d 106, 1324 N. E. 2d 872, 365 N. Y. S. 2d 509

(1975), ordered the suppression of the pistol where the frightened defendant drew and pointed it at plainclothes detectives who unlawfully surrounded him. Even though there was no search, and the defendant exhibited the gun of his own volition, the New York court asserted: "The proscription against unreasonable searches and seizures is designed to prevent random, unjustified interference with private citizens . . ., and [c]onstitutional protections do not vanish merely because the victim of the unlawful governmental action fails to perceive the identity of the violator as a police officer." 36 N. Y. 2d at —, 324 N. E. 2d at 876, 365 N. Y. S. 2d at 515. And in *Commonwealth v. Whitaker,* — Pa. —, 336 A. 2d 603 (1975), the Supreme Court of Pennsylvania suppressed a murder case confession because it was the fruit of the defendant's unlawful arrest. While under arrest, the defendant gave police the name of the assailant who then confessed, implicating defendant as his accomplice. Re-arrested, defendant also confessed. Though the confession was to a serious crime, the Court concluded that the demands of the Fourth Amendment forbade police exploitation of the illegal detention, even though *Miranda* warnings preceded both the initial inculpatory statement and the subsequent confession. *Miranda* warnings, the Court held, did not dissipate the taint of the unlawful arrests.

In the interval, therefore, between *Calandra* and this Court's consideration of this cause, federal and state appellate tribunals have continued to apply the exclusionary sanction—in serious cases as well as those involving minor offenses. Some state high courts have explicitly recognized that *Calandra* was limited to the attempt to

extend the exclusionary rule and that the rule applies with unabated force at trial. *See,* for instance, *Everhart v. State of Maryland,* —— Md. ——, 337 A. 2d 100, 116 (1975). Other decisions have construed the rule "liberally to safeguard the right of privacy." *United States v. Lefkowitz,* 285 U. S. 452, 464 (1932). Where the enforcement of the Fourth Amendment has been less enthusiastic, it has been applied, in the words of Mr. Justice Clark of the California Supreme Court, dissenting from what he regarded as an extension of the sanction, with the realization that "the exclusionary rule should probably not be abandoned until the Legislature provides an effective alternative." *Dyas v. Superior Court of Los Angeles County, supra,* 11 C. 3d at 637, 522 P. 2d at 680 (1974). In this exposition of authority we have confined the discussion to the post-*Calandra* period, the decisions prior thereto having been fully discussed and argued previously before this Court. We believe, however, that recent cases demonstrate that *Mapp v. Ohio* is, not yet at least, to use a phrase of Mr. Justice Frankfurter dissenting in *United States v. Rabinowitz,* 339 U. S. 56, 86 (1950), an "outmoded decisio[n] eroded by time." Like Chief Justice Burger, state and federal tribunals seem to be "hesitant to abandon [the exclusionary rule] until some meaningful substitute is developed. . . ." *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 415 (1971).

We submit that no meaningful substitute has to this date been devised, and that the proposals in petitioner's Brief, pp. 28-35, are no more than that—proposals. Indeed, petitioner concedes that Nebraska statutes waiving

sovereign immunity "are still undoubtedly deficient," but suggests that this Court either overthrow or drastically modify the exclusionary imperative BEFORE Nebraska—not to speak of the other 49 States and the Congress—replaces the rule with an effective substitute. But in the words of Mr. Chief Justice Burger, "[w]ithout some effective sanction, these protections would constitute little more than rhetoric. . . ." *Bivens, supra,* 403 U. S. at 415. This Court therefore should not deprive Americans of Fourth Amendment protections until Congress and the States heed the call of the Chief Justice in *Bivens, supra,* and provide alternative but equally effective strategies that reasonably promise to insure that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ."

B. Post-Calandra academic discussion of the exclusionary rule supports its retention within the framework of this Court's prior decisions.

As the Court knows, as long ago as Dean Wigmore's notorious opposition to the exclusionary rule (*see* Wigmore, *Using Evidence Obtained by Illegal Search and Seizure,* 8 A. B. A. Jour. 479 (1922), there has been a drumfire of criticism of the rule, nearly all of it predicated on suspicions of inefficacy rather than on opposition to the Fourth Amendment itself. This pragmatically oriented dissent has culminated in recent years in an enormous literature. Indeed, in Kamisar, et al.'s *Modern Criminal Procedure,* 189 (1974), some twenty recent articles and books are cited as "expressions of disen-

chantment with the Exclusionary Rule or discussion of the limitations upon its effectiveness." But, perhaps because for every reaction there is a counter-response, since this Court's *Calandra* opinion, several commentators have stressed those aspects of the rule not necessary and undiscussed in *Calandra,* and in doing so have effectively rebutted critics of the exclusionary imperative. At the very least, this literature contradicts the assertion of petitioner's Brief, p. 35, that "even the law review writers, generally law professors, whom one would normally expect to be on the other side of the issue, as illustrated in the commentary and suggestions, in general and for the most part agree that the exclusionary rule is not working and should be modified." We submit to this Court that a number of law professors are just where Petitioner suggests they might be expected to stand—"on the other side of the issue" from petitioner.

Frequently cited criticism of the exclusionary rule is found in Dallin Oak's *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970); subsequent work by his student Spiotto in *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives,* 2 J. Legal Studies 243 (1973); and in Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford L. Rev. 1027 (1974). Since the empirical work of Oaks and Spiotto has drawn the most attention of opponents of the exclusionary imperative, the recent post-*Calandra* literature has sought to undercut the scientism of the empirical studies. In fact, Oaks himself warned against the seductive appeal of attempting to demonstrate whether the rule "works." In writing about the

inherent limitations of disproving the deterrent effect of exclusion and of his own effort, he said that it represents "the largest fund of information yet assembled on the effect of the exclusionary rule, but . . . obviously fall[s] short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." Oaks, *supra,* at p. 709.

Though Spiotto lacked the self-criticism, not to speak of restraint, of Professor Oaks, his work has drawn its share of criticism too. As one commentator pointed out:

> "One can measure the number of desegregated schools reapportioned legislative districts, or even the frequency with which '*Miranda* warnings' are given by the police. But research on the exclusionary rule is complicated by the inability to observe or measure compliance directly. Compliance with the rule usually amounts to a *non-event* that is not observable—it consists of not conducting illegal searches. Though empiricism is theoretically neutral, the simple fact that some phenomena are more easily measured than others often means that direct observation aids only one side of an evaluation. Such is the case with the exclusionary rule." Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra,* 69 Nw. U. L. Rev. 740, 747-48 (1974), (hereinafter cited as "Spiotto Critique.")

In attacking Spiotto's suggestion that his study indicated " . . . that over a 20-year period in Chicago the proportional number of motions to suppress evidence allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct," The *Spiotto Critique, supra,* at p. 751, suggests that his conclusion is unsound for a variety of reasons:

> "First, it rests on a highly selective interpretation of data which was collected in a somewhat haphazard fashion. Second, the inference upon which the conclusion of the rule's deterrent inefficacy rests is based on a research design which contains a critical mistake regarding the date of the rule's introduction in Illinois. Third, motions to suppress cannot be used as indicators of illegal searches for the type of research question posed by Spiotto."

Professor Bradley C. Canon of the University of Kentucky has also reviewed both the Oaks and Spiotto work as well as several other empirical studies of the exclusionary rule and declared:

> "[T]he evidence heretofore collected which bears on the exclusionary rule's efficacy is insufficient and largely inappropriate. . . . A third weakness in the existing evidence relates not as much to the findings in the . . . material *per se* as to the perspective in which the research was undertaken and the findings featured. Most of the researchers have either sought out evidence of the exclusionary rule's failure or upon finding it they have spotlighted it in their discussions . . . [N]obody has searched for evidence or illustrations of compliance with the Fourth Amendment as a result of the exclusionary rule. . . . [S]ome researchers should have turned the perspective upside down; non-compliance should have been expected as routine while significant changes in police search and seizure should have been considered unusual and noteworthy." Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion,* 62 Kent. L. Jour. 681, 698, 701-702 (1974), hereinafter cited as 'Canon.'"

Canon, in fact, suggests that his own findings based in part on police and FBI reports in some forty cities indicate that the exclusionary rule has had a "decided impact

upon the nation's police . . . [and] cast considerable doubt on earlier conclusions that the rule is ineffective in deterring illegal police searches." Canon, *supra,* at pp. 717 and 725. And John Kaplan in his article which is fundamentally antipathetic to the exclusionary imperative argues on the one hand that "the empirical studies to date support the view that the impact of the exclusionary rule on the policeman's on-the-street behavior is minimal," and on the other that, "the rule does seem to have some effect on police behavior." Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford L. Rev. 1027, 1033 (1974).

The contradiction in Kaplan's observations we believe epitomizes the conflict which exists in the literature on the efficacy of the exclusionary rule. As Professor Anthony Amsterdam observed in the Oliver Wendell Holmes lectures in January of 1974 at the University of Minnesota, Professor Oaks' comprehensive survey indicates "nothing more than that the evidence so far gathered is a standoff, and that the hopes of gathering better evidence in the future are very slim." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 475 n. 593 (1974), (hereinafter cited as "Amsterdam.") We submit that a decade and a half of scholarship after *Elkins v. United States,* 364 U. S. 206 (1960), has done little more than demonstrated that "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data [on the efficacy of the exclusionary rule] could ever be assembled." 364 U. S. at 218. The following remarks by Professor Canon illustrate the futility, if not the constitutional bankruptcy of attempts to prove whether the exclusionary rule "works":

> "It would be folly to base decisions to continue or abandon momentous policies on a story from city X or a single data tabulation from city Y. To do so would subordinate a broad and dispassionate consideration of justice to reactive attitudes to what could be dramatic and relatively rare phenomena; . . . [A]s should be the case in all important questions of public policy, such a decision [should] be based on as large a quantity of reliable and valid information as can reasonably be obtained. This is particularly the case where constitutional policies are involved. By definition as well as by tradition, such policies should be stable. Stability should not be equated with inflexibility. But stability does mean that constitutional policies should be more than mere reflections of prevailing ideological winds, and it suggests that the consideration which goes into the promulgation of these policies extends beyond casual or emotional reaction to particular events or short-term political pressures." Canon, supra at pp. 697 and 726.

Fortunately, not all of the scholars have been busy counting motions to suppress. Recent literature—perhaps in response to the mono-dimensional analysis of *Calandra* (which we concede was perhaps all that was necessary to avoid extending the exclusionary rule) affirms the entire cluster of values enshrined in what we have at times in this Brief described as *Mapp's* "exclusionary imperative." As Professors Thomas S. Schrock and Robert C. Welsh of the University of California, Santa Barbara, declare in their recent, and we think, monumental article, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L. Rev. 251, 379, 373-74 (1974), (hereinafter cited as "Constitutional Requirement"):

". . . Pragmatic experiment does not compel respect. If people are to accept exclusion, they must be approached neither as witnesses to judicial manipulation of the police, nor as incipient vigilantes whose favor must be curried by the courts, but as fellow citizens ready to consider and perhaps to accept and respect an exclusionary holding—as long as the ground of the decision is more than the court's own fiat. As we have argued, that ground is the defendant's exclusionary right, . . . [The exclusionary rule] is just another term for (1) having the court in one's case respect the security of one's person, house, papers, effects, and privacy, by declining to participate in an illicit evidentiary transaction—the Fourth Amendment here understood as performing its duty-imposing function of obligating the courts to eschew that transaction; and (2) having the court in recognition of its duty to sanction only valid governmental acts, invalidate executive misconduct by excluding the products of that misconduct from one's trial—the Fourth Amendment here understood as one among many power-conferring and power-limiting rules of recognition. At stake here is the individual's right to have the court apply the relevant rules of recognition, which is, in turn, a specification of his more general right to have the government obey its own laws in the prosecution of him. The subject is the individual's right to enjoy the rule of law, and the government's duty to afford it—a right and duty presumably guaranteed by the due process clauses and not to be neglected because of the more fashionable preoccupation with privacy."

Schrock and Welsh devote much of their article to a critique of both the deterrence and judicial integrity arguments for exclusion and opt forcefully for a rationale grounded in "a personal constitutional right to exclusion. . . ." *Constitutional Requirement, supra,* at p. 272. The personal rights or purposeful-normative dimension to the

exclusionary rule has found expression elsewhere in the post-*Calandra* literature. *See,* for example, Sevilla, *The Exclusionary Rule and Police Perjury,* 11 San Diego L. Rev. 839 (1974); and Note, *United States v. Calandra,* 13 Duquesne Law Rev. 107, 110, 113-114 (1974). And in Note, *The Fourth Amendment Exclusionary Rule in the Grand Jury Setting: United States v. Calandra,* 9 Harv. Civ. Lib.-Civ. Rights L. Rev. 598, 619, 601 (1974) though conceding that so long as the exclusionary rule is rooted in "the unstable ground of deterrence theory, empirical analysis of the rule in operation becomes increasingly important," the author makes it clear that the exclusionary rule as portrayed in *Weeks v. United States,* 232 U. S. 383 (1914) "was essential to the preservation of the integrity of the judicial process, . . . [a concern that was] coupled with a view that an exclusionary rule was an essential ingredient of the search victim's personal fourth amendment right of privacy." Admitting that deterrence has been stressed in decisions since *Elkins,* the author suggests that all three rationales for the rule retained "some vitality" until *Calandra,* which the author views "as the culmination of efforts to develop an effective procedural limitation on the exclusionary rule." *Id.* at 603, 613.

Whatever view or views retain "vitality" as a theoretical justification for the rule, we believe Professor Amsterdam makes a point, essentially political in the grand sense of the word, which ultimately captures what the Fourth Amendment *and* its exclusionary imperative is all about:

". . . [T]he authors of the Bill of Rights had known oppressive government. I believe they meant to erect

every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. And, to this end, it seems to me that the guarantee against unreasonable searches and seizures was written and should be read to assure that any and every form of such interference is at least regulated by fundamental law so that it may be 'restrained within proper bounds.' . . .

"The ultimate question . . . is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, at pp. 400 and 403.

As Schrock and Welsh argue it may well be that "Amsterdam makes the amendment over in the image of the exclusionary rule . . . understood according to deterrence premises that is the image." While he is a foe of what we might term bare deterrence theory, he does nevertheless as Schrock and Welsh indicate, use deterrence theory as one which "ascribes to the exclusionary rule the purpose of controlling the police rather than the purpose of avoiding judicial furtherance of governmental wrongdoing. . . . [I]t is clear that Amsterdam's 'regulatory' theory is simply a systematized species of [the] deterrence genus." *Constitutional Requirement,* supra at p. 275, n. 78.

Amsterdam's view is thus we submit closer to that of most of the members of this Court in his merging of the different emphases of *Weeks, Elkins* and *Mapp* so that his exclusionary rule protects citizens against police conduct which ultimately erodes the constitutional order.

Despite the fact, for instance, that he concretely affirms both senses of the judicial integrity rationale ("If [the court] receives the products of . . . searches and seizures without regard to their constitutionality and uses them as the means of convicting people whom the officer conceives it to be his job to get convicted, it is not merely tolerating but inducing unconstitutional searches and seizures." Amsterdam, *supra* at p. 432), he sees the rule, as have recent opinions of this court, as "calculated to prevent, not repair." *Elkins, supra,* 364 U. S. at 217. Though we urge this Court to endorse the promise of *Boyd v. United States,* 116 U. S. 616, 630 (1886), that the Fourth Amendment expresses "the very essence of constitutional liberty and security" and that the essence of a violation of the guarantee "is the invasion of [the] indefeasible right of personal security, personal liberty and private property," we concede that the momentum of the contemporary movement to enhance governmental power makes Amsterdam's characterization of the *Boyd* view as somewhat "extreme" perhaps closer to the realities of a nation growing accustomed to "the sprawling, mass-producing, self-perpetuating systems of spies and informers spawned by a professional police investigating 'vice' and supposed subversion. . . ." Amsterdam, *supra* at pp. 432 and 401. We thus close this discussion of recent academic consideration of the exclusionary imperative with his words:

"I am not suggesting that the exclusionary rule is an explicit command of the Constitution, nor do I mean to make more of the Fourth Amendment's language than the skin of the living thought that dwells within. The rule was fashioned by judges as an expression

of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable search and seizure which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command." Amsterdam, *supra* at p. 433.

II.

Resuscitation of constitutionally deficient search warrants would seriously abridge the Fourth Amendment's requirement that judicial scrutiny precede police intrusion into homes and pose a special threat to unpopular persons and causes.

At the outset, we reject the euphemism "rehabilitation" with which petitioner characterizes the bold and regressive contention that search warrant affidavits be amended after the warrant has issued and the police have invaded the citizen's home. Adoption of petitioner's proposal would seriously dilute the Fourth Amendment's warrant requirement. The reinforcing or solidifying connotations of the word "rehabilitation" are entirely misleading. Petitioner in fact seeks the excision of an important constitutional safeguard.

In *Johnson v. United States,* 333 U. S. 10, 15 (1948), the Supreme Court reversed a conviction based upon illegally seized evidence, emphasizing the failure of the officers to fulfill "the constitutional duty of presenting their evidence to a magistrate. . . ." This Court has consistent-

ly reaffirmed the *Johnson* principle, evincing an unyielding hostility to searches without warrants and probers without probable cause. Stressing the need for continued adherence to the warrant requirement, even with national security in the balance, the Court said "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States v. United States District Court,* 407 U. S. 297, 318 (1972). The Court was aware of the political sensitivity of some criminal investigations and warned that "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and free speech." 407 U. S. at 317.

In view of this Court's frequently expressed fidelity to the Fourth Amendment warrant requirement, the overhaul urged by petitioner affronts contemporary search and seizure doctrine. The implications of the so-called "rehabilitation" doctrine, which hereinafter we shall describe more properly as the resuscitation doctrine, are pervasive. Magistrates, whose detached scrutiny now serves as a shield against unwarranted violations of privacy, would become clerks, their determinative functions essentially usurped by the chimera of an eventual review where additional information about probable cause might—or might not—be introduced. If a haphazard affidavit was subject to ex post facto supplementation in defense of a defectively warranted search, the "oath or affirmation" provision of the Fourth Amendment would in effect be amended to read "oath, affirmation, or hindsight." Police officers would be encouraged to make, and magistrates encouraged to approve careless, incomplete,

or deliberately mal-fashioned warrant applications, secure in the knowledge that second-chance probable cause hearings at which new and untested findings were introduced, might well compound previous violations of the Constitution. "And we must remember that the authority we concede to conduct searches and seizures . . . may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the gravest felonies." *Brinegar v. United States,* 338 U. S. 160, 182 (1949) (Jackson, J., dissenting).

A second and equally dangerous consequence of resuscitation is that it would work with marked severity against political or social groups whose activities and remarks, though protected by the First Amendment, have attracted the attention of law enforcement agencies. It is indeed of consequence that in this case the warrant was largely predicated upon respondent's political utterances and his membership in the National Committee to Combat Fascism (A. 9). The unconstitutional resuscitation hearing transgressed the same First Amendment ground. The prosecution, relying on a file on respondent and his organization (A. 15), offered evidence of statements in NCCF newsletters (A. 15-16), respondent's status in the organization (A. 16, 44), and his statements of opinion as to the timeliness of the crime. (*State v. Rice,* 188 Neb. 738-739, 199 N. W. 2d 487-488 (1972)). Without doubt, the actions of the Omaha police in this case underscore the importance of Mr. Justice Powell's observation that, "Fourth Amendment protections become all the more necessary when the targets of official surveillance may be

those suspected of unorthodoxy in their political beliefs." *United States v. United States District Court,* 407 U. S. 297, 314 (1972).

The increasing tendency—and technological sophistication—of law enforcement authorities in monitoring groups suspected of advocating or planning disruptions of the social order is, of course, well known. *See* generally A. Weston, *Privacy and Freedom* (1967) and *Laird v. Tatum,* 408 U. S. 1 (1972). We contend that resuscitation will most likely occur when files and dossiers are stuffed with bits and pieces of information, much of it no better "than a casual rumor circulating in the underworld." *Spinelli v. United States,* 393 U. S. 410, 416 (1969). Indeed, only in such circumstances will the prosecution be able to adduce supplementary materials in search of probable cause and claim that the police possessed but did not adduce such materials in the application for the warrant.

Resuscitation, then, becomes a weapon primarily for use against groups or individuals who have incurred political or social disfavor. This totalitarian variety anti-crime weapon is not only hostile to the Fourth Amendment but undercuts the guarantees of the First Amendment as well. Under a resuscitation regime, those who exercise First Amendment freedoms will no longer find them holding a "preferred position," *Kovacs v. Cooper,* 336 U. S. 77, 88 (1949), but instead will exercise them in the dread that today's protected statement may be the pretext for the next midnight's search.

Despite our assertion that resuscitation ultimately "chills" the exercise of First Amendment rights, we stress most of all the concept's incompatibility with the Fourth Amendment. Twice this Court has made specific mention of the possibility that defective warrants might be resuscitated by additional information known to the police but not disclosed to the magistrate. Twice this Court has rejected the idea. In *Aguilar v. Texas,* 378 U. S. 108, 109 n. 1 (1963), Mr. Justice Goldberg observed: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."

Rejecting resuscitation again in *Whitely v. Warden,* 401 U. S. 560, 565 n. 8 (1971), the Court declared: "Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless."

The constitutional doctrine mandating previous rejection of the "rehabilitation" concept has vitality today. "The warrant clause of the Fourth Amendment is not dead language." *United States v. United States District Court, supra* at 315. We respectively urge that yielding to the temptation of resuscitation would constitute a giant step towards the demise of the protection the Constitution affords against searches and seizures without probable cause.

III.

Abandonment or significant modification of the exclusionary rule will impact disproportionately on minorities and remove a major check on unlawful police conduct regressively affecting law enforcement.

Racial minorities have traditionally looked to this Court for some measure of protection, and as one scholar has said, there is "some historical support" for a claim by Blacks for "a place as special ward of the Constitution." Kaplan, *Segregation Litigation and the Schools —Part II: The General Northern Problem,* 58 Nw. U. L. Rev. 157, 186 (1963). See McGee, *Blacks, Due Process, and Efficiency, etc.,* 2 Black Law J. 220 n. 4 (1972). This is certainly still true today in a hostile social-cultural order of which police brutality and misconduct is, in the view of minority groups, but the cutting edge, a world in which policemen are the "enemy who protects only the white power structure." Comment, *Civilian Complaints of Police Misconduct—Some Answers and More Questions,* 48 Temple L. Q. 89, 107 (1974). See Swan, *The Politics of Identification, etc.,* 20 Crime and Delinq. 119 (1974).

While this Court has not typically discussed Fourth Amendment protections in the context of racial conflict, the problem is not without judicial discussion. *See* for instance, *Lankford v. Gelston,* 364 F. 2d 197 (4th Cir. 1966). Clearly Fourth Amendment litigation is relevant to "[t]he policeman in the ghetto [who] is the most visible symbol, finally, of a society from which many ghetto

Negroes are increasingly alienated." *Report of the National Advisory Commission on Civil Disorders,* 157 (1968). As John J. Flynn of the Phoenix Bar and counsel of record in *Miranda v. Arizona* observed at the 1972 Judicial Conference of the United States Court of Appeals for the Ninth Circuit:

> ". . . [S]earch and seizure cases arise not on the North Shore of Chicago but in the ghettos of Chicago. The people that are searched and the people who have evidence seized from them are not the persons [at the judicial conference], but they are the persons who need the most protection from the courts, the persons whom the court has said must have effective assistance of counsel, the persons who are already in sore conflict with the police department.
>
> "It is now suggested that the police be unshackled in those areas to make indiscriminate searches, to be allowed to enter those homes, with the thought that those persons who would never sue a police officer can seek compensatory damages. It is not their nature, and they have not and they will not. But it is not your home and my home which will be subjected to the unlawful search and seizure, and the only deterrent and the only protection for those people is if the court says, 'If you bring that evidence to court, it will not be admitted in evidence against this defendant or these defendants.'" *The Exclusionary Rule,* 61 F. R. D. 259, 283 (1973).

The President's Commission on Law Enforcement's Task Force Report: The Police, 198 (1967) (hereinafter cited as "Task Force: Police"), indicates that "except where the exclusionary rule has been applied, judicial influence [upon police behavior] has not been substantial." Should this Court abandon or substantially modify the exclusionary rule, it would in effect leave minority groups

at the mercy of those elements in the police who are, to put it mildly, anti-Black. One study in a 450,000 inhabitant city of a "highly select group of officers" in a department "noted within the community it served and among law-enforcement officials everywhere for the honesty and superior quality of its personnel," discovered that "eighteen of twenty-seven officers interviewed openly admitted a dislike for Negroes." Piliavin and Briar, *Police Encounters With Juveniles,* 70 American Journal of Sociology 206, 207, 212 (1964). Another celebrated study obtained through direct observation of police-citizen encounters in Boston, Chicago, and Washington during a seven-week period in the summer of 1966 revealed that the "great majority of white officers" held anti-Black attitudes.

> "In the predominantly Negro precincts, over three-fourths of the white policeman expressed prejudiced or highly prejudiced sentiments toward members of the Negro race . . . Only 1 per cent expressed attitudes sympathetic toward Negroes. A larger proportion of officers verbalized 'highly prejudiced' attitudes in the heavily Negro precincts than did officers in either of the other two kinds of racially populated areas." Black and Reiss, *Patterns of Behavior in Police and Citizen Transactions,* Vol. II, Sec. 1, p. 136, *Field Surveys III, Studies in Crime and Law Enforcement in Major Metropolitan Areas,* (1967).

It borders, therefore, on understatement, to say that "studies of the police reveal unanimity in findings on this point: the majority of rank and file policemen are hostile toward Black people." 3 *The Politics of Protest, etc.,* 184 (1969) (A staff report to the National Commission on the Causes and Prevention of Violence). *See* also:

J. Skolnick, *Justice Without Trial* (1966); A. Niederhoffer, *Behind the Shield: The Police in Urban Society* (1967); and B. Levy, *Cops in the Ghetto: A Problem of the Police System,* 11 American Behavioral Scientist 31 (March-April, 1968); and Balch, *The Police Personality: Fact or Fiction;* 63 J. Crim. L. C. & P. S. 106, 117-119 (1972).

Black response to this hostility is not difficult to imagine. As the Kerner Commission Report declared at page 157:

> ". . . [D]eep hostility between police and ghetto communities [was] a primary cause of the disorders surveyed by the Commission. In Newark, Detroit, Watts, and Harlem—in practically every city that has experienced racial disruption since the summer of 1964, abrasive relationships between police and Negroes and other minority groups have been a major source or grievance, tension and, ultimately, disorder."

At the risk of belaboring what by now to any fair-minded and educated American must be obvious, we offer the words of the celebrated Black novelist James Baldwin which we believe sum up eloquently the tragedy of contemporary America:

> ". . . The only way to police a ghetto is to be oppressive. None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people; they swagger about in twos and threes patrolling. Their very presence is an insult, and it would be, even if they spent their entire day feeding gumdrops to children. They represent the force of the white world, and that world's real intentions are, simply, for that world's criminal profit and ease, to keep the Black man corralled up here, in his place. The badge, the gun in the holster, and the swinging club, make vivid what will happen should his rebellion become overt . . .
>
> "It is hard, on the other hand, to blame the policeman, blank, goodnatured, thoughtless, and insuperably innocent, for being such a perfect representative of the people he serves. He, too, believes in good intentions and is astounded and offended when they are not taken for the deed. He has never, himself, done anything for which to be hated—which of us has? And yet he is facing, daily and nightly, the people who would gladly see him dead, and he knows it. There is no way for him not to know it: There are few things under heaven more un-nerving than the silent, accumulating contempt and hatred of a people. He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where he is, and is the reason he walks in twos and threes." J. Baldwin, *Nobody Knows My Name,* 65-67 (1962).

We therefore implore this Court to retain the exclusionary imperative as a major barrier to police misconduct in minority communities. Other remedies have ranged from ineffective to useless. Distinguished criminologist Marvin Wolfgang, in his influential *Crime and Race,* 72 (1970), has said: "Two striking facts emerge from the few studies and reports of civilian review boards: (1) many more blacks than whites report instances of police misconduct to the boards; (2) few of the cases reported result in sanctions against the police." As Kamisar and his colleagues summarize the situation: "Criminal prosecutions and civil suits have generally proved to be ineffective . . ." Kamisar et al., *Modern Criminal Procedure,* 197 (1974). *See* also the discussion of the "deceptive alternatives" to the exclusionary sanc-

tion by Mr. Justice Murphy, dissenting in *Wolf v. Colorado,* 338 U. S. 25, 41 (1949). Professor Amsterdam, no unthinking proponent of exclusion and indeed one who has called for its supplement through police department rules and regulations, has stressed:

> "Maintenance of the exclusionary sanction would, at the least, provide recurrent occasions for reconsideration of the rules by both the courts and the police themselves—necessary occasions, I believe, if constitutional deficiencies, administrative problems, and practices of evasion are to be flushed out and corrected. The sanction would also probably provide the only available incentive to the police to make the rules, make them clear and make them a part of recruit and in-service training." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minnesota L. Rev. 349, 429 (1974).

Need we say finally, that more hangs in the balance than the civil rights of racial minorities. As Bruce J. Terris has said:

> ". . . [I]mproved police-community relations are essential not only to minority groups. They are equally important to the police and to the entire community. The police simply cannot operate effectively as long as they are viewed with skepticism or hostility by much of the population in large sections of the city. Such attitudes are often not reported, that witnesses often refuse to identify themselves or to testify in court, and that suspects resist arrest with the tacit or even physical support of bystanders.
>
> "Police officers do their work with the consciousness that they are distrusted or hated by many of the people they see or talk to; they are frequently taunted or cursed; they are sometimes physically attacked . . . [T]his hostility has a marked effect on the morale of police departments, and therefore on their effectiveness as organizations, their efforts to recruit new officers, and their ability to retain existing officers." Terris, *The Role of the Police,* 374 Annals of the American Academy of Political and Social Science 61-62 (1967).

It is by now more than clear that "[p]oor police-community relations adversely affect the ability of the police to prevent crime and apprehend criminals." *Task Force: Police, supra,* at p. 144. In the first place, in a community hostile to police, crimes frequently go unreported. A St. Louis study found that 43 percent of Blacks believed that most city residents were afraid to contact the police. *Id.* If the crime is reported, citizen cooperation in its solution—often indispensible to a successful result—is more often than not withheld.

Moreover, police field operations suffer where police are reluctant to act, or else over-react. "When unfriendly crowds begin to gather, officers will necessarily have to call for reinforcements and use greater force to secure the offender and control the onlookers." *Id.* at p. 145. Indeed, the sheer physical safety of police may be jeopardized in an atmosphere of hostility to the police. "[M]any of the minor assaults (and some of the more serious ones as well) result, at least partially from general hostility toward the police." *Id.*

Rather than casting aside the exclusionary rule in order to "un-handcuff the police," we believe that rejection or meaningful modification of the rule will exacerbate minority group-police conflict and make law enforcement more difficult than it already is. While clearly mere heeding of the teachings of this Court in the law of search and seizure is but the beginning of effective police-com-

munity relations, and other strategies such as proper recruitment and in-service training must play a vital, indeed ultimate role in up-grading police practices (*see* R. Clark, *Crime in America,* 132-150 (1970); judicial review of police behavior through use of the exclusionary rule is influential in conforming police behavior to civilized standards. Here, indeed, "the government is the potent, the omnipresent teacher." *Olmstead v. United States,* 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

CONCLUSION

The National Conference of Black Lawyers very respectfully urges this Court to affirm the decisions of the Court of Appeals and the Chief District Judge. Both courts assiduously followed to the very letter, not only the actual holdings of the precedents that control this cause, but also acted in the highest tradition of the federal judiciary in protecting Constitutional rights in a case involving an unpopular defendant. The exclusionary rule is a dramatic example of the American commitment to equal justice and personal liberty. Its rejection in this case would deal a serious blow to racial minorities who earnestly need and seek the protection of the Federal judiciary in their quest for full citizenship. The National Conference of Black Lawyers affirms the need for effective law enforcement in the context of respect for the dignity of the human personality and reverence for law, but urges that rejection or substantial modification of the exclusionary

rule would be a signal to regressive sectors of our society that this Court sanctions a "no holds barred" approach to police work.

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Respectfully submitted,

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